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No. ~~92-040~~

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OCTOBER TERM, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

vs.

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

vs.

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DECARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should a provision in a fidelity policy issued to employee benefit funds, providing that suit under the policy must be commenced within two years from the time that the insured discovers the loss, be upheld and enforced, where neither the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001, et seq. ("ERISA") and the Bonding Rules promulgated by the United States Department of Labor in 29 C.F.R. subchapter I, Part 2580, contain any limitations period application to an action under a fidelity bond?

2. Should the two-year suit limitation period set forth in a fidelity bond be upheld where Section 2580.412-19(c) of the Bonding Rules

promulgated by the Department of Labor pursuant to Section 412(e) of ERISA, 29 U.S.C. Section 1112(e) authorizes provisions in a fidelity bond consistent with the law of the state in which the bond is executed, and New York law enforces contractual limitations periods in fidelity bonds and other insurance policies?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SHEET METAL WORKERS UNION LOCAL 38 INSURANCE AND WELFARE FUND; SHEET METAL WORKERS UNION LOCAL 38 PENSION FUND; SHEET METAL WORKERS UNION LOCAL 38 VACATION FUND; SHEET METAL WORKERS UNION LOCAL 38 ANNUITY FUND; WILLIAM R. PAGANO, As Participant, Beneficiary and Trustee of Sheet Metal Workers Union Local 38 Insurance and Welfare Fund, Pension Fund, Vacation Fund, and Annuity Fund,

Petitioners,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

AETNA CASUALTY AND SURETY COMPANY,

Third-Party Plaintiff,

- against -

MARTIN J. SCHWIMMER, MARIO RENDA, JOSEPH DeCARLO, SR. and FIRST UNITED FUNDS, LTD.,

Third-Party Defendants.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, The Aetna Casualty and Surety Company ("Aetna"), respectfully submits this brief in opposition to the petition for a writ of certiorari seeking a review of the order of the United States Court of Appeals for the Second Circuit, entered in this case on May 28, 1992.

STATUTES AND REGULATIONS INVOLVED

Respondent concurs with the statutes reproduced in Appendix E to the Petition. In addition, respondent respectfully refers the Court to the relevant portions of "The Temporary Bonding Rules under the Employee Retirement Income Security Act of

1974" in 29 C.F.R. Subchapter I, Part 2580, which is reproduced in Appendix A to this brief.

COUNTER-STATEMENT OF THE CASE

Introduction

The issues presented for review by petitioners, concerning the enforcement of a two-year limitations period for suits under a fidelity bond issued to employee benefit funds, are neither recurring, controversial matters giving rise to a conflict among the federal circuit courts of appeals, nor are they significant matters in the enforcement of the federal statutory scheme set forth in ERISA. As will be demonstrated in further detail herein, the two-year contractual limitations period, which begins to run when the insured discovers the loss, does not conflict

with any provision of ERISA. That statute does not prescribe a limitations period for suits under a fidelity bond issued to employee benefit plan fiduciaries. Additionally, the two-year limitations period is fully consistent with the Bonding Rules promulgated by the United States Department of Labor, the agency charged with enforcing the ERISA statute. Specifically, Section 2580.412-19(c) of the Bonding Rules authorizes provisions in a fidelity policy consistent with the law of the state in which that policy is executed. As will be further demonstrated herein, the courts of New York, the state in which the fidelity bond at issue was executed, have consistently upheld and enforced contractual limitations periods in

fidelity bonds and other insurance policies. Accordingly, the matter at issue is resolved by well-settled state law. There is, thus, no reason for this Court to exercise its discretion to grant the petition for certiorari.

Background

This section corrects the inaccuracies and omissions in the statement of the case in the petition for certiorari. Respondent respectfully submits that a thorough understanding of the facts, including the relevant provisions of the fidelity bond at issue and the timing of petitioners' claim on the bond and their commencement of the instant action to recover thereunder, is essential to enable this Court to make a reasoned determination whether to

grant the petition.

STATEMENT OF FACTS

Petitioners, the employee benefit funds of Sheet Metal Workers Union Local 38 ("petitioners" or "Sheet Metal Workers Funds"), by their letter dated June 17, 1987, made a claim for the full coverage amount under a Comprehensive Dishonesty, Disappearance and Destruction Policy ("Aetna's policy" or the "fidelity bond") written by respondent, Aetna Casualty & Surety Company ("Aetna"), as insurer.

The basis of petitioners' claim, as set forth in their letter of June 17, 1987, was "for losses resulting from alleged dishonesty on the part of Martin J. Schwimmer, our former investment adviser, in connection with

his handling and investment of our funds."

Section 8 of Aetna's policy requires that any suit brought under the policy must be commenced within two years from the date that the insured discovers its loss. Petitioners' suit, however, was not commenced until November 29, 1989, more than two years after their letter of June 17, 1987, acknowledging the discovery of losses due to the alleged dishonesty of Martin J. Schwimmer ("Schwimmer").

Aetna's Policy

Aetna's policy insured petitioners, against, inter alia, "Loss of Money, Securities and other property which the Insured shall sustain ... resulting directly from

one or more fraudulent or dishonest acts committed by an Employee, acting alone or in collusion with others."

In enlarged print, the policy provided that the insuring agreement and general agreements:

> "...ARE SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS."

Section 8 of the policy is encaptioned in large print as follows:

> "LOSS-NOTICE-PROOF
>
> ACTION AGAINST COMPANY"

Section 8 provides, in pertinent part, as follows:

> No action shall lie against the Company ...at all unless commenced within two years from the date when the insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute

> controlling the construction of this Policy, the shortest permissible statutory limitation shall govern and shall supersede the time limitation herein stated.

(emphasis added)

Events Leading To Petitioners' First Notice To Aetna Of Their Claim

By letter of June 17, 1987, Robert Carleton, the Manager of the Sheet Metal Workers Funds, advised Aetna "... of our claim for $1,000,000.00, the full coverage under the above policy...for the losses resulting from the alleged dishonesty on the part of Martin J. Schwimmer, our former investment advisor, in connection with his handlings and investment of our funds." This letter coincided with the indictment of Schwimmer and a co-conspirator, Mario Renda. That indictment and petitioners' letter making claim against Aetna followed an

uncontroverted series of events going back to 1985, pertaining to Schwimmer and Renda and their dealings with the Sheet Metal Workers Funds.

In August 1985, the Sheet Metal Workers Local Union 38 Insurance and Welfare Fund was subpoenaed by the Special Assistant United States Attorney, Bruce Maffeo, the attorney responsible for the criminal prosecution of Schwimmer, to testify before a Grand Jury. The Insurance and Welfare Fund was required to produce, pursuant to that subpoena, inter alia, "Bank Statements... for all operating accounts," a "Descriptive List of all investments made...", "Names and last known addresses of all investment counselors", and correspondence and other documents pertaining to

investment counselors. Robert Carleton, himself, was subpoenaed to testify before the Grand Jury in connection with a RICO investigation of Schwimmer.

At the July 21, 1986 meeting of the Board of Trustees of the Local 38 Pension and Annuity Funds, Dr. Schwimmer was asked by the Trustees' counsel to provide a letter "setting forth in detail his arrangement with all brokers and other intermediaries... through which investments are made for the Funds". Dr. Schwimmer agreed to provide such a letter, in compliance with a Department of Labor technical release, "after consultation with his attorney".

At a meeting held on July 29, 1986, Dr. Schwimmer, again, assured

the Trustees that he would provide a letter describing how he invested the Fund monies. Discussions concerning Schwimmer's relationship with intermediaries through which monies were invested continued at the meeting of the Trustees held on September 16, 1986.

By a letter dated September 16, 1986, Schwimmer advised the Trustees of his relationship with First United Fund. Renda was president and owner of First United Fund and its parent corporation, First United Financial Corp. ("First United").

At the Trustees' meeting of October 6, 1986, there were extensive discussions of the Federal government's investigation of "brokered deposits" and of "charges pending against Dr. Schwimmer." The

Funds' attorney "asked for details of the work Dr. Schwimmer does for First United". Dr. Schwimmer revealed that he provided services to First United and that First United had been sued by the FDIC for RICO violations.

Discussions with Dr. Schwimmer concerning his relationship with First United Fund continued at the Trustees' meeting of December 18, 1986.

A Grand Jury indictment of Schwimmer and Renda was ordered unsealed on June 16, 1987. That 45-page indictment described, in detail, the involvement of Schwimmer and Renda in a scheme to obtain excessive commissions from banks and savings and loan associations in which they invested money from the Sheet Metal Workers Funds.

On June 17, 1987, the day after

the detailed Grand Jury indictment of Schwimmer and Renda was ordered unsealed, Fund manager Carleton wrote to Aetna making claim for the full policy amount for Schwimmer's alleged defalcations.

Events Following Petitioners' Claim Letter To Aetna

Renda entered into a plea agreement with the government with respect to certain charges in the indictment in May, 1988. Schwimmer was convicted of a majority of the counts of the indictment on October 28, 1988, after trial.

On October 27, 1988, the Sheet Metal Workers Funds commenced an action against Schwimmer and Renda alleging RICO violations. The complaint against Schwimmer and Renda was basically a reiteration of the

June, 1987 criminal indictment against them.

The Sheet Metal Workers Funds provided Aetna with a "proof of loss", dated February 8, 1989. Significantly, petitioners' proof of loss designated June 8, 1977 (sic) as the date the insured "learned of Loss" and June 17, 1977 (sic)[1] as the date that the loss was reported to the insurance company.

On June 19, 1989, Aetna's counsel wrote a letter to Fund manager Carleton requesting certain documents needed to evaluate the claim made under the Aetna policy. Said letter contained the following concluding

---

1. This appears to be an error. It is likely that petitioners meant that they discovered the loss on June 8, 1987 and reported it to Aetna on June 17, 1987, the date of Mr. Carleton's letter making claim on the policy.

paragraph:

> Please be advised that nothing heretofore, nor contained herein, is intended as a waiver, estoppel or modification of the terms, provisions, conditions, limitations or exclusions of Aetna's policy of insurance, all of which are expressly reserved, together with such rights and defenses as are available pursuant to the policy or by law.

On September 15, 1989, Aetna's counsel wrote a further letter to petitioners' counsel reiterating the request for certain documents to evaluate the claim. Said letter concluded with a paragraph reserving Aetna's rights and defenses under the policy.

On October 23, 1989, Aetna's counsel met with the attorneys for the Sheet Metal Workers Funds and Fund Manager Robert Carleton to discuss the claim made by the Funds.

At the October 23, 1989 meeting, petitioners' counsel executed, on behalf of the Sheet Metal Workers Funds, a letter containing the following provisions, known as a "non-waiver agreement".

> It is agreed and understood that any action done to date or to be done subsequently by or on behalf of either the Aetna Casualty and Surety Company or the Employee of Benefit Funds of Sheet Metal Workers Local 38 ("Local 38 Funds") in connection with the claim by the Local 38 Funds under Comprehensive Dishonesty, Disappearance and Destruction Policy No. 74 BY 3109 BCA for an alleged loss sustained as the result of the acts of Martin J. Schwimmer, ...shall not be construed to be an admission of liability on the claim, nor shall it be construed to waive or modify any of the terms, conditions and provisions of the policy. It is further understood that any action taken relative to the claim shall not constitute an estoppel or waiver of any kind, nor waive, invalidate, forfeit or modify any of the rights, remedies, liabilities or defenses which either the

> Aetna Casualty and Surety Company or the Local 38 Funds may have with respect to the aforesaid insurance policy or claim.

(emphasis added)

The Instant Action And The Proceedings Below

On or about November 29, 1989, over five months after the expiration of the two-year limitations period contained in Aetna's policy, petitioners commenced the instant action recover under the policy.

After service of an answer and an amended answer, as well as a set of interrogatories, Aetna was granted leave by the District Court to move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Petitioners cross-moved for partial summary judgment.

In a well-reasoned opinion, Hon.

Vincent L. Broderick of the United States District Court for the Southern District of New York granted Aetna's motion for summary judgment and denied petitioners' cross-motion.

The District Judge's opinion concluded that petitioners' action was time-barred due to their failure to commence the action within the two-year limitations period prescribed by Aetna's policy. After reviewing the extensive history of petitioners' knowledge of the loss caused by the dishonesty of Schwimmer, beginning in the summer of 1985, the District Court concluded, "under the objective standard enunciated by the Second Circuit, the latest possible date upon which plaintiffs may be deemed to have discovered that alleged loss was June 17, 1987, the day the Local 38 Funds

administrator notified Aetna of the alleged loss" (P. 19a[2]).

In his opinion, Judge Broderick correctly rejected the argument which is the basis for the instant petition, namely, that the contractual limitations period for actions brought under Aetna's policy is superseded by Section 413 of ERISA, 29 U.S.C. Section 1113. The opinion of the District Court correctly reasoned, as follows:

> Plaintiff incorrectly attempts to apply the limitations period set forth in section 413. The limitations periods prescribed in this section relate only to actions alleging"... a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of

---

2. Page references preceded by "P" refer to the Petition for Certiorari. The designation "a" refers to the appendix to the petition in which the opinion of Hon. Vincent L. Broderick is printed.

> this part...". In the instant case, the Local 38 Funds seek to enforce Aetna's alleged contractual obligation to indemnify the Sheet Metal Workers Funds pursuant to an insurance policy. For ERISA section 413 to be applicable, the Local 38 Funds would have to allege a breach of duty by a fiduciary or a violation of Part 4 of ERISA, 28 U.S.C. Section 1101, et seq.
>
> Section 412 of ERISA, 29 U.S.C. Section 1112, requires bonding of every fiduciary and of every person who handles the funds or other property of an employee benefit plan. This statute does not prescribe a limitations period for suits to enforce provisions of fidelity bonds issued to ERISA benefit plans. The fact that Aetna's policy was issued to satisfy certain statutory requirements of ERISA does not preclude the enforcement of Aetna's two-year contractual limitations period.

(P. 22a-23a)

Petitioners appealed to the United States Court of Appeals for the Second Circuit. In a unanimous decision, the Court of Appeals affirmed the judgment of the District Court "substantially

for the reasons set forth in Judge Broderick's order of October 18, 1991" (P. 2a-3a). Petitioners are seeking the review of this order of the Second Circuit.

ARGUMENT

POINT I

THIS CASE IS INAPPROPRIATE FOR REVIEW, AS THE SOLE ISSUE RAISED BY PETITIONERS IS NOT AN IMPORTANT, RECURRING, CONTROVERSIAL QUESTION WARRANTING RESOLUTION BY THIS COURT

The review by this Court "on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 of the Rules of the United States Supreme Court. This is not a case involving issues sufficiently important or controversial to warrant review by this Court.

The Rules of this Court further provide that two major criteria for determining whether to grant a petition for a writ of certiorari are:

(1) whether "a United States Court of Appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter" (Rule 10(a) of the Rules of the United States Supreme Court. See Northeastern Pennsylvania National Bank and Trust Co. v. United States, 387 U.S. 213, 87 S.Ct. 1573, 18 L.Ed. 2d 726 (1967); Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962)); and (2) "(w)hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court ...". Rule 10(c) of the Rules of the United States Supreme Court. See also I.C.C. v. Atlantic Coast Line Railroad Co., 383 U.S. 576, 86 S.Ct. 1000, 16

L.Ed.2d 109 (1966); Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963); Pearlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190. The instant case meets neither of the above criteria.

First, there is no conflict among the United States courts of appeals regarding the issue raised by petitioners, namely, whether the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001, et seq. ("ERISA") preclude the enforcement of a contractual limitations period for the commencement of actions to recover under a fidelity bond issued to fiduciaries of an employee benefit

fund. Petitioners have failed to cite a single decision from a federal court of appeals, or any other federal court, adhering to their position that the time to bring an action to recover under a fidelity bond issued pursuant to Section 412(a) of ERISA, 29 U.S.C. Section 1112(a) is governed by the limitations period for actions "with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part ..." set forth in Section 413 of ERISA, 29 U.S.C. Section 1113. Nor is there any support for petitioners' alternative contention that the time to bring an action to recover under a fidelity bond is governed by the state limitations period for actions to recover for breach of contract.

Indeed, petitioners actually concede, "The present action is apparently the first instance wherein the issue (referring to the enforceability of the contractual limitations period in a fidelity bond or other insurance policy) has arisen in the context of ERISA" (P. 20) (parenthetical supplied).

The cases cited by petitioners regarding the provisions of fidelity bonds and other insurance policies issued in accordance with federal statutes are irrelevant. Many of petitioners' authorities do not even deal with insurance policies issued pursuant to ERISA. For example, Hack v. American Surety Co. of New York, 96 F.2d 939 (7th Cir. 1938), cert. denied, 305 U.S. 631, 59 S.Ct. 95, 83 L.Ed.2d 405 (1938), reh'g denied, 305

U.S. 671, 59 S.Ct. 145, 83 L.Ed.2d 435 (1938), a decision upon which petitioners rely heavily, concludes, based upon the law of the State of Indiana, not federal law, that the limitations period in a state statute controls over the one-year contractual limitations in a fidelity bond insuring against loss due to the dishonesty of bank officers. The fidelity bond at issue in Hack was required by a state, not a federal, statute and contained explicit language providing that if the twelve-month contractual limitations period shall "'be void under the law of the place governing the construction hereof'", then actions to recover under the bond must be commenced "'within the shortest period of limitation permitted by such law'."

Hack v. American Surety Co. of New York, 96 F.2d at 941. The Court of Appeals held that an action to recover under the fidelity bond had to be brought within the three-year limitations period, provided by Indiana law, applicable to foreign corporations. Hack v. American Surety Co. of New York, 96 F.2d at 942, 944.

In the instant case, by contrast, neither Section 412 of ERISA, 29 U.S.C. Section 1112, nor the Bonding Regulations promulgated by the Secretary of Labor pursuant to Section 412(e) of ERISA, 29 U.S.C. Section 1112(e), prescribe a limitations period for actions to recover under a fidelity bond. Indeed, as will be discussed in further detail in Point II, infra, the applicable Department of Labor regulations explicitly permit

a fidelity bond issued pursuant to Section 412(a) of ERISA to contain a limitations period which is not "in contravention of the law of the State in which it is executed". 29 C.F.R. Section 2580.412-19(c).

Federal and state cases from New York cited by petitioners unanimously uphold contractual limitations periods in insurance policies, analogous to the two-year limitations period in Aetna's policy at bar. See Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2nd Cir. 1989); Kahn v. Lumbermens Mutual Casualty Co., 293 F.Supp. 985 (E.D.N.Y. 1968); Proc v. Home Insurance Company, 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966), rearg. denied, 18 N.Y.2d 751, 274 N.Y.S.2d 1031, 221

N.E.2d 183 (1983). The above cases concern fire insurance policies, where there are stronger reasons for invalidating contractual limitations periods than petitioners assert in relation to the fidelity bond at bar. Fire insurance policies are often issued to individuals, who may not be represented by counsel, as were the Sheet Metal Workers Funds in the instant case. Nevertheless, the Standard Fire Insurance Policy prescribed by Section 3404(e) of the New York Insurance Law specifically authorizes a two-year limitations period for actions to recover under the policy[3].

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3. The cases cited by petitioners have enforced even shorter contractual limitations periods. For example, Kahn v. Lumbermens Mutual Casualty Co., 293 F.Supp. 985 and Proc v. Home Insurance Co., 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136, applied

Other authorities relied upon by petitioners, likewise, do not deal with the validity of the contractual limitations period in fidelity bonds issued pursuant to Section 412(a) of ERISA. In Dixey v. Federal Compress and Warehouse Co., 132 F.2d 275 (8th Cir. 1942), the Court of Appeals concluded that regulations promulgated by the Secretary of Agriculture, requiring warehousemen to procure insurance for cotton stored in their facilities, must be read into and

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a 12 month limitations period for fire insurance policies. The New York Insurance Law, Section 3404(e), subsequently adopted a two-year limitations period for the Standard Fire Insurance Policy. In Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp 706, the District Court enforced a one-year contractual limitations period in a multi-peril policy for a business interruption loss, as opposed to the two-year limitations period in the New York Standard Fire Policy.

deemed a part of every warehouse receipt. In the instant case, by contrast, the applicable regulations by the Secretary of Labor do not prescribe a specific limitations period for fidelity bonds issued pursuant to Section 412 of ERISA but, rather, specifically authorize such policies to incorporate limitations periods consistent with the applicable state law. See 29 C.F.R. Section 2580.412-19(c).

In American Casualty Co. of Reading, Pa. v. Irvin, 426 F.2d 647 (5th Cir. 1970), the Court of Appeals concluded that statutory and regulatory provisions relating to bonds issued pursuant to the Packers and Stockyards Act, requiring thirty days' notice prior to termination, must be read into bonds procured by

livestock dealers. Lastly, Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), reh'g denied, __ U.S. __, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991), dealt with the limitations period applicable to actions brought pursuant to Section 10(b) of the Securities Exchange Act of 1934 and did not deal at all with the contractual limitations periods in insurance policies.

Several decisions cited by petitioners even support the enforcement of the contractual limitations period in Aetna's policy. For example, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), this Court applied state tolling provisions to a civil rights suit

brought pursuant to 42 U.S.C. Section 1981, where the state statute of limitations was applied. As will be discussed in further detail in Point II, infra, it is perfectly permissible to apply the provisions of Section 201 of New York's Civil Practice Laws and Rules, authorizing parties to prescribe shorter limitations periods by written agreement, to fidelity bonds issued to employee benefit plans, for which ERISA does not provide a federal limitations period.

In Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), this Court applied a 6-month limitations period to an action brought by an employee against a union alleging breach of the duty of fair representation. See also Degan v.

Ford Motor Co., 869 F.2d 889 (5th Cir. 1989); United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985) (following Del Costello). The 6-month limitations period endorsed by this Court for actions against a labor organization alleging breach of the duty of fair representation is far shorter than the two-year limitations period in Aetna's policy. Moreover, actions for breach of the duty of fair representation are generally brought by individual employees, who may not be represented by counsel. By contrast, the Sheet Metal Workers Funds at bar are relatively sophisticated organizations which were represented by counsel during the course of their claim on Aetna's policy.

Several cases cited by petitioners even conclude that ERISA does not prohibit contractual provisions which modify the procedures for enforcing certain statutory remedies. For example, in Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116 (2nd Cir. 1991), cert. denied, ___ U.S. ___, 111 S.Ct. 2891, 115 L.Ed.2d 1056 (1991), the Court of Appeals held that ERISA does not prohibit parties from agreeing to submit statutory claims for breach of fiduciary duty to arbitration. The Court of Appeals reached the above conclusion, based upon the prior decisions of this Court in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), and Shearson Lehman/American Express, Inc.

v. Bird, 493 U.S. 884, 110 S.Ct. 225, 107 L.Ed.2d 177 (1989), despite the fact that Section 502(e)(1) of ERISA, 29 U.S.C. Section 1132(e)(1), explicitly provides that the federal courts shall have exclusive jurisdiction over all civil actions to enforce ERISA, except actions to recover benefits brought pursuant to section 502(a)(1)(B) of ERISA, 29 U.S.C. Section 1132(a)(1)(B).

The above result strikes a mortal blow at petitioners' assertion that the federal policies behind ERISA preclude parties from contractually agreeing to a limitations period for actions to recover under a fidelity bond issued pursuant to 29 U.S.C. Section 1112(a), particularly in view of the fact that both the statute and the Department of Labor regulations

are silent on this issue. See also Scheirer v. NMU Pension and Welfare Plan, 585 F.Supp. 76 (S.D.N.Y. 1984) (upholding limitations period of two years and 90 days to recover death benefit, established by rules of union pension and welfare plan).

In sum, the absence of caselaw supporting petitioners' assertions that ERISA precludes the enforcement of the two-year contractual limitations period in Aetna's policy reveals the lack of importance of this issue. Accordingly, there is no basis for this Court to exercise its discretion to grant the petition for a writ of certiorari in this matter.

POINT II

THE RESULT REACHED BY THE COURT BELOW, CONCLUDING THAT PETITIONERS' ACTION IS BARRED BY THE TWO-YEAR CONTRACTUAL LIMITATIONS PERIOD IN AETNA'S POLICY, IS FULLY CONSISTENT WITH ERISA, THE APPLICABLE DEPARTMENT OF LABOR REGULATIONS AND THE STATE LAW GOVERNING THIS MATTER

There is no necessity for this Court to take the extraordinary action of granting the petition for a writ of certiorari, as the result reached by the Court below[4] accords fully with the applicable provisions of ERISA, the Department of Labor regulations, and the state law governing the enforcement of contractual limitations periods in insurance policies. As was

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4. The well-reasoned opinion of Hon. Vincent L. Broderick of the United States District Court for the Southern District of New York, which was affirmed by the United States Court of Appeals for the Second Circuit, is reprinted in the appendix to the petition at P. 4a-28a.

emphasized in Point I, supra, petitioners have not cited a single authority which adopts their position that the limitations period set forth in Section 413 of ERISA, 29 U.S.C. Section 1113 or, alternatively, the state limitations period for actions to recover for breach of contract, should supersede the contractual limitations period in a fidelity bond issued to an employee benefit plan.

The language of the statutory provisions cited by petitioners does not support their position. Section 412 of ERISA, 29 U.S.C. Section 1112, does not prescribe a limitations period for actions to recover under a fidelity bond issued to an employee benefit plan. Section 413 of ERISA, 29 U.S.C. Section 1113, deals with limitations of actions "with respect

to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part ...", not with actions to recover under a fidelity bond. See Wright v. Southwestern Bell Telephone Co., 925 F.2d 1288, 1290 (10th Cir. 1991) (Section 413 of ERISA is "only applicable to actions arising out of violations of the portion of the Act addressing fiduciary responsibilities", not to an action brought by a former employee to recover disability benefits); Trustees of Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Construction Co., Inc., 850 F.2d 613, 618 n.8 (10th Cir. 1988) ("The statute of limitations contained in 29 U.S.C. Section 1113 applies only to actions brought to redress a fiduciary's

breach of its obligations to enforce the provisions of ERISA"); Scheirer v. NMU Pension and Welfare Plan, 585 F.Supp at 79 (limitations period in Section 413 of ERISA does not apply to a father's suit to recover death benefits owed for his son, where no breach of fiduciary duty was alleged.

An insurance company, like Aetna, which issues a fidelity bond to an employee benefit fund, is not even a fiduciary, pursuant to the provisions of ERISA. See Rochester Radiology Associates, P.C. v. Aetna Life Insurance Co., 616 F.Supp. 985 (W.D.N.Y. 1985) (insurance company which issued group annuity contract to a retirement fund is not a fiduciary, within the meaning of ERISA). Accordingly, there is no legal support for petitioners' assertion that the

instant action to recover under Aetna's policy is governed by the limitations period in Section 413 of ERISA.

Petitioners neglect to mention the significant fact that the applicable regulations promulgated by the Secretary of Labor do not prescribe a limitations period for actions to recover under a fidelity bond issued to an employee benefit fund. Indeed, the regulations specifically provide that a fidelity bond issued pursuant to Section 412(a) of ERISA will not fulfill the statutory requirements if "it contains a clause, or is otherwise, in contravention of the law of the State in which it is executed." 29 C.F.R. Section 2580.412-19(c)[5].

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5. The above provision is contained in the "Temporary Bonding Rules under the Employee Retirement Income Security

The Department of Labor regulations contain requirements regarding other aspects of fidelity

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Act of 1974". These regulations define the requirements under ERISA, as well as under Section 13(a) of the Welfare and Pension Plans Disclosure Act of 1958, as amended, the predecessor statute to ERISA. Another provision of the Department of Labor regulations explains, as follows:

> Section 2550.412-1 Temporary bonding requirements
>
> (a) Pending the issuance of permanent regulations with respect to the bonding provisions under section 412 of the Employee Retirement Income Security Act of 1974 (the Act), any plan official, as defined in section 412(a) of the Act, shall be deemed to be in compliance with the bonding requirements of the Act if he or she is bonded under a bond which would have been in compliance with section 13 of the Welfare and Pension Plans Disclosure Act, as amended (the WPPDA), and with the basic bonding requirements of subparts A through E of part 2580, title 29 CFR.

To date, the Secretary of Labor has not promulgated permanent regulations

bonds issued to plan fiduciaries, including, for example: (1) the definition of "fraud and dishonesty" (29 C.F.R. Section 2580.412-9); (2) the amount of the bond (29 C.F.R. Section 2580.412-11); (3) the term of the bond (29 C.F.R. Section 2580.412-19(a)); and (4) a provision for mandating a one-year discovery period after the termination or cancellation of the bond (29 C.F.R. Section 2580.412-19(b)). The omission from the regulations of a provision establishing a limitations period for actions to recover under the bond is further evidence that Congress and the Secretary of Labor intended to leave this matter to the States. It is well-settled that the regulations

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concerning fidelity bonds issued pursuant to Section 412(a) of ERISA.

promulgated by an agency, like the Department of Labor, entrusted with enforcing a statute, are entitled to great deference. See, e.g. Dixey v. Federal Compress and Warehouse Co., 132 F.2d 275, supra.

The clear import of both the relevant provisions of ERISA and the Department of Labor regulations is that state law governs the applicable limitations period for suits to recover under a fidelity bond.

As was emphasized in Point I, supra, the law of New York has consistently enforced contractual limitations periods set forth in insurance policies. See, e.g. Fox-Knapp, Inc. v. Employers Mutual Casualty Co., 725 F.Supp. 706 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2nd Cir. 1989); Kahn v. Lumbermens

Mutual Casualty Co., 293 F.Supp. 985 (E.D.N.Y. 1968); Proc v. Home Insurance Co., 17 N.Y.2d 239, 270 N.Y.S.2d 412, 217 N.E.2d 136 (1966), rearg. denied, 18 N.Y.2d 751, 274 N.Y.S.2d 1031, 221 N.E.2d 183 (1983); Culinary Institute of America v. Aetna Casualty and Surety Co., 151 A.D.2d 638, 542 N.Y.S.2d 705 (2nd Dept. 1989) (upholding two-year limitations period in fidelity bond issued by Aetna); Alray International Equipment, Inc. v. Aetna Casualty and Surety Co., 65 A.D.2d 651, 409 N.Y.S.2d 664 (3rd Dept. 1978), aff'd, 48 N.Y.2d 750, 422 N.Y.S.2d 666, 397 N.E.2d 1333 (1979) (upholding two-year limitations period in blanket crime protection policy issued by Aetna); Section 201 of the New York Civil Practice Laws and Rules. New York law upholds the

contractual limitations periods in insurance policies, even if they were issued to federally regulated businesses, as was the stockholders' blanket bond at issue in Redington v. Hartford Accident and Indemnity Co., 463 F.Supp. 83 (S.D.N.Y. 1978).

Courts from other jurisdictions have, likewise, consistently enforced contractual limitations periods in insurance policies, irrespective of whether the policies were issued to federally regulated businesses or organizations. In the case of Riddlesparger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 19 L.Ed. 257 (1868), this Court enforced a one-year limitations period in a fire insurance policy. This Court made the following observations, which are equally applicable to the limitations

period in Aetna's policy at bar. "The condition (limitations period) in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained, respecting which a controversy arises between the parties." Riddlesparger v. Hartford Insurance Co., 74 U.S. at 391 (parenthetical added).

In the instant case, as well, no federal policy is offended by the two-year limitations period in Aetna's policy. The Sheet Metal Workers Funds were represented by counsel throughout the period when the claim on Aetna's policy was made. Indeed, the Sheet Metal Workers funds brought an action against Schwimmer and Renda, the

alleged wrongdoers, well within the limitations period for an action to recover under Aetna's policy. The untimeliness of the instant action results entirely from lack of diligence on the part of the Sheet Metal Workers Funds, rather than any inherent flaw with the contractual limitations period. See Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3rd Cir. 1990) (Suit by benefit plan trustees against employer to recover contributions barred by applicable state statute of limitations, as trustees did not exercise reasonable diligence in investigating and discovering employer's breach of collective bargaining agreement); Rochester Radiology Associates v. Aetna Life Insurance Co., 616 F.Supp. 985, 989 (W.D.N.Y. 1985)

(beneficiaries of group annuity contract time-barred from suing Aetna pursuant to Section 413 of ERISA, 29 U.S.C. Section 1113, as the plaintiffs clearly had knowledge of the change in the formula for valuation of the plan assets, yet failed to act diligently in assessing the impact of the change).

The federal courts have upheld contractual limitations periods in insurance policies under a variety of circumstances, including policies required by federal statutes or policies issued to federally regulated entities. In Skirlick v. PATCO, 659 F.Supp. 104 (D.D.C. 1987), aff'd on other grounds sub nom. Skirlick v. Fidelity & Deposit Co. of Maryland, 852 F.2d 1376 (D.C. Cir. 1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 790,

102 L.Ed.2d 781 (1989), the District Court granted summary judgment to an insurer in an action by employees to recover under a fidelity bond issued pursuant to Section 502(a) of the Labor-Management Reporting and Disclosure Act of 1959, as the plaintiffs failed to bring the action within the contractual limitations period, in that case one year after the discovery of the loss. The Court concluded that enforcing the contractual limitations period would not offend any federal policy advanced by the statute. The District Court observed, "I fail to see any significant relationship between the bonding requirements of Section 502 and the Bill of Rights guarantees of Section 101(a)(4) and thus cannot see how enforcing the notice provisions of

this union contract (referring to the fidelity bond) will undercut the union members statutorily guaranteed rights." Skirlick v. PATCO, 659 F.Supp at 107[6] (parenthetical added). Similarly in the instant case, petitioners' assertion that the limitations period in Aetna's policy conflicts with the federal policies underlying ERISA is devoid of merit and support.

In Farley v. Northwest Marine Iron Works, 724 F.Supp. 1274 (D. Ore. 1989), the District Court held that a widow's action to recover life

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6. The District Court also concluded in Skirlick v. PATCO, 659 F.Supp. at 107-108, that the action to recover on the fidelity bond should be dismissed for another reason, namely, that the alleged illegal strike lead by the union leaders did not constitute "fraud or dishonesty", within the meaning of the bond, the statute, or the applicable regulations.

insurance benefits pursuant to an ERISA-regulated plan was barred by the three-year contractual limitations period authorized by the applicable state law. In Fuller v. Blue Cross and Blue Shield of Florida, 677 F.Supp. 1131 (N.D. Fla. 1987), the District Court enforced a two-year limitations period contained in a health insurance plan pursuant to the Federal Employees Health Benefit Act. See also Scarborough v. Travelers Insurance Co., 718 F.2d 702 (5th Cir. 1983) (enforcing contractual limitations period in workers' compensation policy, where injured party brought an action pursuant to the Jones Act, 46 U.S.C. Section 688, following McMillian v. Coating Specialist, Inc., 427 F.Supp. 54 (E.D. La. 1976)); Goosen v. Indemnity

Insurance Co. of North America, 234 F.2d 463 (6th Cir. 1956) (Court enforces contractual limitations period in suit brought by trustee in bankruptcy to recover under a fidelity bond); Chandler Trailer Co. v. Lawyer's Surety Corp., 535 F.Supp. 204 (E.D. Ark. 1982) (Court enforces two-year contractual limitations period for suit to recover under a fidelity bond as fully consistent with the applicable state law). As the cases cited above demonstrate, there is no support for petitioners' argument that the contractual limitations period for actions to recover under Aetna's policy conflicts with ERISA and the federal policies underlying the statute.

The cases cited by petitioners are irrelevant to the issue in this

matter. Kennedy v. Allied Mutual Insurance Co., 952 F.2d 262 (9th Cir. 1991) did not deal with the issue of the contractual limitations period in a fidelity bond but, rather, whether the plan at issue is governed by ERISA or is exempt from that statute. Similarly, Isola v. Hutchinson, 780 F.Supp. 1299 (N.D. Cal. 1991), did not deal with an insurer's contractual limitations period, but rather, held that a plan participant whose benefits were not paid has standing to sue the insurers who issued fidelity bonds to the plan fiduciaries. See also Alleyne v. McCusker, 5 E.B.C. 1650 (C.D. Cal. 1983) (although Department of Labor regulations regulating fidelity bonds issued pursuant to Section 412(e) of ERISA authorize a one-year discovery period to cover

claims after the termination of the bond, this provision is not enforced where a party can prove that the wrongdoer so dominated the employee benefit trust, that the trustees were prevented from timely discovering the loss).

A group of cases cited by petitioners involve suits by plan participants or beneficiaries to recover benefits. The majority of these cases hold that such actions are governed by the applicable state limitations period for breach of contract claims. See, e.g., Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990); Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593 (2nd Cir. 1983), cert. denied, 464

U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); Plazzo v. Nationwide Mutual Insurance Co., 697 F.Supp. 1437 (N.D. Ohio 1988), rev'd, 892 F.2d 79 (6th Cir. 1989), cert. denied, __ U.S. __, 111 S.Ct. 370, 112 L.Ed.2d 332 (1990).

Another group of cases cited in the petition deal with suits by employee benefit funds and their trustees to recover unpaid contributions. The majority of these decisions apply the applicable state limitations period for breach of contract actions. See, e.g., Trustees of Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Construction Co., 850 F.2d 613 (10th Cir. 1988); Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987); Trustees for

Alaska Laborers-Construction Industry Health and Security Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987); Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986), cert. denied, 479 U.S. 1086, 107 S.Ct. 1291, 94 L.Ed.2d 147 (1987).

Other decisions, however, follow the ruling of the United States Court of Appeals for the Third Circuit in Adams v. Gould, Inc., 739 F.2d 858 (3rd Cir. 1984), cert. denied sub. nom. Gould, Inc. v. Adams 469 U.S. 1122, 105 S.Ct. 806, 83 L.Ed.2d 799 (1985), that the limitations period in Section 413 of ERISA, 29 U.S.C. Section 1113 applies to actions by employees and benefit fund trustees to compel employers to contribute to the funds. See also Edwards v.

Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d 52 (3rd Cir. 1985), cert. denied, 474 U.S. 843, 106 S.Ct. 130, 88 L.Ed.2d 107 (1985); Bower v. Bunker Hill Co., 675 F.Supp. 1254 (E.D. Wash. 1986) (limitations period in Section 413 of ERISA applies to suit to compel corporation to provide lifetime medical benefits to former employees); Smith v. ABS Industries, Inc., 653 F.Supp. 94 (N.D. Ohio 1986) (limitations period in Section 413 of ERISA governs action by former employees against employer to establish their rights to medical and life insurance benefits); Sparks v. Ryerson and Haynes, Inc., 638 F.Supp. 56 (E.D. Mich. 1986) (retirees' action challenging employer's change in their pension benefits governed by limitations period in Section 413).

Significantly, none of the above cases cited by petitioners deals at all with the limitations period applicable to actions to recover under a fidelity bond issued pursuant to Section 412(a) of ERISA. The lack of caselaw supporting petitioners' position and the overwhelming weight of legal authority supporting the decision of the court below, enforcing the contractual limitations period in Aetna's policy, underscores the meritlessness of the petition.

CONCLUSION

For the above reasons, this Court should decline to grant the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: New York, New York
September 24, 1992

Respectfully submitted,

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APPENDIX

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APPENDIX A

29 C.F.R. Section 2580.412-19(c) provides, as follows:

> (c) Other bond clauses. A bond shall not be adequate to meet the requirements of section 13, if, with respect to bonding coverage required under section 13, it contains a clause, or is otherwise, in contravention of the law of the State in which it is executed.